

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

JAN 16 2007

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

GREG CANTUA ORTEGA,

Appellant.

2 CA-CR 2005-0233

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of  
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20041393

Honorable Nanette M. Warner, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General  
By Randall M. Howe and Alan L. Amann

Tucson  
Attorneys for Appellee

Wanda K. Day

Tucson  
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 After a trial to the court, Greg Cantua Ortega was convicted of possession of a deadly weapon by a prohibited possessor, possession of a dangerous drug, and possession of drug paraphernalia. The trial court imposed mitigated, concurrent sentences of eight

years' imprisonment on the first two felony convictions and a mitigated, concurrent term of three years on the paraphernalia conviction. Ortega appeals his convictions, claiming the trial court erroneously denied his motion to suppress evidence he claimed had been gathered in violation of the Fourth Amendment to the United States Constitution. We affirm.

¶2 In reviewing the denial of a motion to suppress evidence, we consider only that evidence adduced at the suppression hearing and view the facts in a light most favorable to upholding the trial court's ruling. *State v. May*, 210 Ariz. 452, ¶ 4, 112 P.3d 39, 41 (App. 2005). The ruling itself, however, is a conclusion of law we review *de novo*. *State v. Smith*, 208 Ariz. 20, ¶ 6, 90 P.3d 221, 223 (App. 2004).

¶3 Ortega claims that the police officer lacked a reasonable suspicion to detain him. Ortega also contends the officer lacked probable cause to search his person and his vehicle. For those reasons, Ortega contends that the gun, methamphetamine, and paraphernalia discovered during the searches should be suppressed.

¶4 At the suppression hearing, Officer Troy Wallen testified he first spotted Ortega's vehicle in a city park at 2:40 in the morning, while on his routine patrol of the park. The vehicle was parked with its lights on, the engine running, and lawn sprinklers wetting the vehicle. Because the park was closed, Wallen drove up behind the vehicle and directed spotlights on it. The car did not move. Reflection off the wet window prevented Wallen from seeing inside the passenger compartment, but if anyone was inside, he or she did not respond to Wallen's arrival. Wallen then walked to the driver's side door of the vehicle and,

with a flashlight, saw that the driver, Ortega, was asleep and holding his exposed penis in one hand. Suspecting Ortega had violated laws prohibiting use of the park at that hour, driving under the influence of an intoxicant (DUI), and exposing oneself indecently, Wallen knocked repeatedly on the window and shone his flashlight in Ortega's face to awaken him.

¶5 Given the darkness, the condition in which Wallen had discovered Ortega, and Wallen's observation of a "folding lock-blade knife" in the center console of the vehicle, Wallen asked Ortega to step out of the car, intending to pat him down for weapons and "conduct further investigation." Wallen testified he intended to arrest Ortega at that point and Ortega was not free to leave. Once Ortega was out of his vehicle, Wallen asked Ortega whether he had any weapons. Ortega told him his back pocket contained a .25 caliber gun. Wallen retrieved the gun and handcuffed Ortega, arresting him on suspicion of indecent exposure and carrying a concealed weapon. Ortega's good balance and apparent lucidity dissipated Wallen's initial suspicion that Ortega had been under the influence of a substance, and the officer did not pursue that portion of his investigation further.

¶6 However, while searching Ortega and the vehicle, Wallen found several small, blue "Ziplock" bags in Ortega's front pocket. He also found a usable amount of methamphetamine and a small spoon in the car. Later, after Wallen had read Ortega the *Miranda*<sup>1</sup> warnings and Ortega had agreed to answer questions, Ortega told Wallen he had intended to fill the bags with marijuana and the methamphetamine had been for his personal

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<sup>1</sup>*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

use. Ortega also told Wallen he had a prior conviction in California and had not had his civil rights restored.

¶7 Under these circumstances, we cannot find the trial court abused its discretion in denying the motion to suppress. Although Ortega suggests that Wallen had an insufficient basis to approach Ortega's car in the public park, Wallen needed no suspicion to do so. "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place." *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386 (1991), *quoting Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 1324 (1983).

¶8 Once Wallen had shone his flashlight into the vehicle and observed a sleeping driver, he had sufficient grounds to ask Ortega to step out of the vehicle. An investigative stop is lawful "if the officer has articulable, reasonable suspicion, based on the totality of circumstances, that the suspect is involved in criminal activity." *State v. Box*, 205 Ariz. 492, ¶ 16, 73 P.3d 623, 628 (App. 2003). Here, Wallen had reasonable suspicion to believe that the driver was violating park rules by his presence in the park after it closed.

¶9 The officer also had reasonable grounds to investigate whether Ortega was in actual physical control of a vehicle while impaired to the slightest degree, in violation of A.R.S. § 28-1381(A)(1). Ortega had fallen asleep in the driver's seat of his car with his penis exposed while parked in a public place. He had done so leaving his car's lights on and its engine running. He did not respond to the arrival of Officer Wallen, although Wallen had

directed his search lights onto Ortega's vehicle. Either Ortega's apparent violation of park rules or the evidence of his irrational behavior while behind the steering wheel of the car with its engine running, would, standing alone, have justified Wallen's detaining Ortega to conduct further investigation. Because Wallen had reasonable suspicion both to believe Ortega had violated park rules and had actual physical control of a vehicle while impaired, we need not address whether Wallen also had reasonable grounds to detain Ortega for indecent exposure.<sup>2</sup>

¶10 Nor did Wallen violate Ortega's *Miranda* rights when Wallen asked Ortega if he had any weapons. Wallen testified he had asked the question in anticipation of performing a pat-down search, specifically stating he did so as a safety measure to minimize his risk of becoming injured by any potential weapons he might otherwise find when "laying hands on" a suspect. The trial court correctly found this question fell "right under [the] public safety exception" to the prohibition against in-custody interrogation of suspects who have not been informed of their rights in conformity with *Miranda*. The exception permits questioning of a suspect who is in custody when the questioning is motivated by an objectively reasonable concern for immediate officer or public safety rather than for evidence-gathering purposes. *See State v. Ramirez*, 178 Ariz. 116, 123, 871 P.2d 237, 244 (1994). That was the case

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<sup>2</sup>Once Wallen possessed reasonable grounds to detain Ortega, the totality of the circumstances also justified Wallen's asking Ortega to step out of the car to minimize the risk of harm to the officer. *See Pennsylvania v. Mimms*, 434 U.S. 106, 109-11, 98 S. Ct. 330, 333 (1977) (despite absence of unusual or suspicious behavior by driver during routine traffic stop, officer's practice of ordering driver out of vehicle was permissible, *de minimis* intrusion).

here, where the officer intended to arrest a suspect with whom he found himself alone in a dark parking lot of a closed park. The lawful discovery of the concealed weapon having then provided yet another basis for arrest, the subsequent search of Ortega's person and vehicle were clearly justified searches incident to the arrest. *See State v. Dean*, 206 Ariz. 158, ¶ 30, 76 P.3d 429, 437 (2003).

¶11 Finding no error in the trial court's denial of the motion to suppress evidence, we affirm Ortega's convictions and sentences.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge